

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Milford, CT, Employer**

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**Docket No. 16-1366  
Issued: April 6, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 22, 2016 appellant filed a timely appeal of a May 5, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision on December 15, 2014 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

**FACTUAL HISTORY**

On June 6, 2014 appellant, then a 50-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained postlaminectomy syndrome as a result of his federal

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

employment. He had stopped work on May 6, 2013. Appellant submitted a July 7, 2014 note describing his modified job duties since 2006 and referred to a February 12, 2014 report from Dr. Lawrence Rapp, a Board-certified neurosurgeon selected as a second opinion physician, from a prior traumatic injury claim for a June 6, 1994 back injury.<sup>2</sup>

Appellant submitted a February 12, 2014 report from Dr. Rapp. Dr. Rapp noted that appellant had worked in some capacity until May 6, 2013, and his described job duties could certainly be responsible for aggravating his underlying degenerative disease and accelerating his L3-4 disc disease. He then discussed possible treatment options, including surgery.

OWCP also received a July 25, 2013 report from Dr. Nadine Jennings, a Board-certified physiatrist. Dr. Jennings indicated that appellant underwent lumbar surgery on May 10, 2005 and, although there was some postoperative improvement, appellant continued to complain of low back pain. She opined that he was totally disabled as a result of chronic low back pain and lumbar postlaminectomy syndrome related to his 1994 injury.

By decision dated July 18, 2014, OWCP denied the claim for compensation. It found that appellant had not established the factual element of the claim.

On November 4, 2014 appellant requested reconsideration of the claim. In an October 27, 2014 letter, he indicated that he had been off work for an extended period and then returned to work in 2006. Appellant described his job duties in bulk mail entry and distribution-related tasks. He also submitted a second October 27, 2014 letter, indicating that he felt medical evidence had been ignored because OWCP had combined the two cases.<sup>3</sup>

By decision dated December 15, 2014, OWCP reviewed the merits of the claim. It found that appellant had described the job duties alleged to have contributed to a back condition, but as to the medical evidence, OWCP found it was insufficient to meet appellant's burden of proof. OWCP found Dr. Rapp had reviewed only the full duties of a clerk, rather than the modified duties appellant performed, and his report did not establish an employment-related disability as of May 6, 2013 causally related to the identified work duties.

Appellant again requested reconsideration on September 8, 2015. He indicated that an additional medical report was enclosed. The current case file does not include additional medical evidence.<sup>4</sup>

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<sup>2</sup> The 1994 claim was accepted for lumbar sprain, lumbar disc degeneration, lumbar spondylosis, and closed dislocation lumbar vertebra. A loss of wage-earning capacity determination was issued on September 6, 1996 based on a modified clerk position (OWCP File No. xxxxxx079). Appellant filed a claim for a recurrence of disability commencing May 6, 2013. By decision dated January 17, 2014, OWCP denied modification of the loss of wage-earning capacity determination.

<sup>3</sup> The record does not indicate that the 1994 claim has been administratively combined with the current claim.

<sup>4</sup> The master OWCP File No. xxxxxx079 shows OWCP received, on September 8, 2015, an August 3, 2015 report from Dr. Rapp.

By decision dated October 14, 2015, OWCP denied merit review of the claim. It did not address any medical evidence and found that appellant had not established entitlement to a merit review.

On January 13, 2016 appellant requested reconsideration. He submitted an August 3, 2015 report from Dr. Rapp, who indicated that he felt his prior reports had been clear. Appellant reported a history of injury in June 1994 and the results of prior examinations. Dr. Rapp indicated that appellant had provided an extensive description of his job duties that he had read the description and “as such, I would state these are a contributing factor.” As to disability, he indicated that he would defer to the physical medicine specialist, Dr. Jennings. Appellant asserted that report had been previously submitted. He resubmitted the October 27, 2014 letter indicating that he felt the medical reports had been improperly ignored due to combining of case records.

By decision dated May 5, 2016, OWCP found the reconsideration request was untimely filed. It further found that there was no evidence that new medical documentation had been submitted prior to the October 14, 2015 decision and appellant had not demonstrated clear evidence of error. OWCP did not review the August 3, 2015 report from Dr. Rapp.

### **LEGAL PRECEDENT**

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>5</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>6</sup>

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.<sup>7</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> It, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.<sup>9</sup> As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.<sup>10</sup> OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.605 (2012).

<sup>7</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

<sup>9</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>10</sup> 20 C.F.R. § 10.607 (2012).

evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>11</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>12</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>15</sup>

### ANALYSIS

In the present case, the last decision on the merits of the claim was the December 15, 2014 OWCP decision. Appellant filed the reconsideration request at issue on January 13, 2016. Since this is more than one year after the last merit decision, it was untimely filed. As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP.

Appellant argued that he had previously submitted an August 3, 2015 report from Dr. Rapp and that the evidence of record had not been properly reviewed. The Board agrees and finds that appellant has demonstrated clear evidence of error by OWCP. When appellant submitted the reconsideration request on September 8, 2015, he indicated that he was submitting an additional medical report. He clearly identified the current OWCP file number and a date of injury as 2013.

The Board has reviewed the case record for the master OWCP File No. xxxxxx079 and finds that on September 8, 2015 OWCP received the August 3, 2015 report from Dr. Rapp. It is well established that when OWCP is adjudicating a claim, it is obligated to consider all evidence properly submitted by a claimant and received prior to the issuance of its final decision.<sup>16</sup> When

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<sup>11</sup> *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>12</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>13</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>14</sup> *Id.*

<sup>15</sup> *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

<sup>16</sup> *See William A. Couch*, 41 ECAB 548 (1990).

OWCP fails to properly consider relevant evidence submitted, it raises a substantial question as to the correctness of the decision and demonstrates clear evidence of error.<sup>17</sup> In the present case, appellant had properly submitted relevant evidence on September 8, 2015 and the October 14, 2015 OWCP decision failed to review the evidence. The Board finds that appellant has demonstrated clear evidence of error in this case.

The case will be remanded to OWCP. After such further development as is deemed necessary, OWCP should issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant has demonstrated clear evidence of error and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 5, 2016 is reversed.

Issued: April 6, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> See *H.G.*, Docket No. 16-0610 (issued October 19, 2016)(appellant submitted evidence one day prior to an OWCP decision, but OWCP did not review the evidence and asserted it was not available for viewing until a day after the final decision. The Board found the failure to review the evidence showed clear evidence of error by OWCP); see also *S.P.*, Docket No. 13-0646 (issued February 4, 2014) (OWCP's failure to review relevant medical evidence in its decisions showed clear evidence of error).